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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CODY LEE,

Plaintiff and Appellant,

v.

CIVIL DEMAND ASSOCIATES, INC. et
al.,

Defendants and Respondents.

G051868

(Super. Ct. No. 30-2014-0726031)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David R. Chaffee, Judge. Motions for judicial notice and to dismiss appeal. Motion for judicial notice granted; motion to dismiss denied. Judgment reversed.

Simoni Consumers Class Action Law Offices and Stephen J. Simoni for Plaintiff and Appellant.

Todd W. Goodman for Defendants and Respondents.

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Plaintiff and appellant Cody Lee appeals from a judgment entered after the court granted a special motion to strike under Code of Civil Procedure section 425.16 (section 425.16; anti-SLAPP motion) his putative class action first amended complaint for extortion against defendants and respondents Civil Demand Associates, Inc. (CDA) and Neal C. Tenen (Tenen; collectively defendants). Among other things, plaintiff argues the statements at issue were not protected under the litigation privilege (Civ. Code, § 47, subd. (b); section 47(b)) and were extortionist and thus not protected activity under section 425.16. He also argues defendants did not have the right to bring a second anti-SLAPP motion because the first amended complaint did not make a new substantive change. Further, he asserts the putative class action is exempt from an anti-SLAPP motion.

We conclude the statements were not protected speech under section 425.16. Consequently, we reverse.

Defendants filed a motion to dismiss the appeal under the disentitlement doctrine on the grounds plaintiff failed to comply with an order to answer postjudgment interrogatories and pay sanctions assessed against him and his lawyer. In connection with the motion to dismiss they filed a motion for judicial notice of that order.

A second ground for the motion to dismiss is the claim plaintiff's lawyer lacks plaintiff's consent to proceed with the appeal. Defendants base this on an unsubstantiated statement by plaintiff's lawyer he had not heard from plaintiff in several months.

We grant the motion for judicial notice but deny the motion to dismiss. ““An appellate court has the inherent power, under the “disentitlement doctrine,” to dismiss an appeal by a party that refuses to comply with a lower court order. [Citations.]”” (*Blumberg v. Minthorne* (2015) 233 Cal.App.4th 1384, 1390.) Dismissal based on the disentitlement doctrine is an equitable remedy subject to our discretion.

(Ironridge Global IV, Ltd. v. ScripsAmerica, Inc. (2015) 238 Cal.App.4th 259, 265.) We do not consider the alleged misconduct so severe or egregious as to warrant dismissal.

As to the purported lack of authority to pursue the appeal, defendants' argument is speculative. The declaration of defendants' counsel states that during the pendency of the case, plaintiff had not filed a declaration in opposition to the anti-SLAPP motion or the motion for attorney fees. Further, he had no evidence, to show plaintiff knew the action or the appeal had been "filed on his behalf." We have no concrete evidence to support this claim and thus no basis to deny plaintiff the right to pursue the appeal.

FACTS AND PROCEDURAL HISTORY

In early February 2013, plaintiff was terminated from his cashier job at Knott's Berry Farm for giving sodas to a coworker, eating parts of a churro, and taking about \$15 in loose change. Tenen, who is a lawyer, had a contract with Knott's Berry Farm to send demand letters "in an attempt to settle potential civil claims" against former employees terminated for theft. Tenen owns part of CDA, which acted as Tenen's agent in connection with the collection efforts.

In late February 2013, Tenen sent a letter to plaintiff on his letterhead, part of which stated: "[Y]ou admitted to causing losses in the amount of \$107.00 to my client, Knott's Berry Farm. [¶] Pursuant to your admission, this office has been retained by Knott's Berry Farm to assist them in collecting the balance. Our records show a current balance of \$400.00, which includes a civil penalty of \$400 pursuant to the enclosed statute. [¶] If you cannot pay the balance in full within thirty (30) days from the date of this letter, we can extend to you payment terms of \$50.00 per month, subject to the conditions below." The conditions apparently included completing a payment coupon and mailing it with payment to the listed address or making a payment online at the delineated Web site.

The enclosed statute was Penal Code section 490.5, subdivisions (b) and (c). This is a shoplifting statute that provides for an action in small claims court to recover up to \$500, including the value of the goods taken.

In May 2013 Tenen sent plaintiff a second letter. On the upper right side, just above the text, there was a box containing: “Balance: \$400.00 [¶] Now Due: \$150.00.” The text of the letter read, in part, “Your account is seriously delinquent. [¶] You agreed to payment(s) of \$50.00 to this office. Your payment is now due by 5/29/2013. This brings your current and past due amounts to \$150.00. [¶] Any further missed payments or payments under the agreed amount may result in your default and the entire amount becoming due. [¶] **IMPORTANT NOTICE:** The payment of any demand made upon you does not prevent criminal prosecution under a related criminal statute provision. Payment of the amount demanded may not be used in any court proceedings as an admission of liability.”

Subsequently, plaintiff filed this action against Tenen and CDA for extortion, defamation, intentional interference with prospective economic advantage, fraud, and negligence.¹ Plaintiff sought, among other things, damages, restitution, injunctive relief, and a declaration that no court had found he had violated Penal Code section 490.5.

The gravamen of the complaint was based on the two letters Tenen sent. In the extortion cause of action, plaintiff alleged defendants attempted to have plaintiff pay money to which they were not entitled by threatening plaintiff, either expressly or impliedly, they would accuse him of theft and have him criminally prosecuted or falsely report he was in default on a debt. Plaintiff also alleged defendants “boast[ed]” Tenen

¹ Plaintiff had already settled a federal court action against Cedar Fair L.P. and Cedar Fair Management, Inc. (collectively Cedar Fair), one of which was the owner of Knott’s Berry Farm. That action also arose out of plaintiff’s termination and the two letters sent by Tenen. Cedar Fair paid plaintiff \$15,000.

was a judge pro tem, “maintain[ed] communication with . . . prosecutors,” and “communicat[ed] with attorneys representing suspects.” (Boldface omitted.) Plaintiff did not attach copies of the two letters to the complaint.

Defendants’ filed an anti-SLAPP motion, which the court denied. It found the extortion cause of action withstood the anti-SLAPP challenge. The complaint sufficiently alleged a violation of Penal Code section 523, which prohibits sending letters to wrongfully induce fear by accusing the recipient of a crime with the intent to extort money. Extortion is not protected under section 425.16. The language about Tenen’s communications with prosecutors was an implied threat of criminal prosecution. The court stated it was impossible to determine if the contents of the two letters were extortionist because defendants had not attached them to their motion. Thus, defendants did not meet their initial burden to show the letters were protected speech.

Thereafter plaintiff filed an amended complaint, removing all causes of action except the extortion claim. In substance, the extortion cause of action was the same as the one in the original complaint, although plaintiff removed some of the original allegations.

Plaintiff also added a class action claim. On information and belief, he alleged defendants had sent similar collection letters to thousands of other similarly situated people, seeking to extort money.

Defendants then each filed a second anti-SLAPP motion. This time they attached copies of the two letters to Tenen’s declaration. In his declaration Tenen also stated that the language regarding his connection with prosecutors was not in the two letters but instead was shown on CDA’s Web site.

The court granted these motions. It ruled the two letters did not contain any implied threat and were not extortionist. The language upon which plaintiff based his claimed extortion was on defendants’ Web site and was not published with the two

letters. There was no threat of criminal prosecution, but the second letter actually stated the reverse, i.e., that payment of the money would not prevent prosecution.

The court further ruled that a demand letter is activity protected under section 425.16 and thus defendants had satisfied their burden. On the other hand, plaintiff did not provide any evidence showing the likelihood he could prevail in the action.

Thereafter, pursuant to defendants' motion, the court awarded them attorney fees and costs of just under \$23,000.

DISCUSSION

1. Overview of Applicable Law

Section 425.16, subdivision (b)(1) provides that a cause of action arising from a constitutionally protected right of free speech may be stricken unless the plaintiff establishes the probability he will prevail on the claim. The court must engage in a two-step analysis under this section. First, it must determine whether the defendant has met its burden to show “that the challenged cause of action is one arising from protected activity.” (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 733.) Second, it must consider whether plaintiff has met his burden to show the likelihood of prevailing on the claim. (*Ibid.*) We review an order granting an anti-SLAPP motion de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325-326.)

Under section 425.16, subdivision (e) an “act in furtherance of a person’s right of petition or free speech under the United States or California Constitution in connection with a public issue’ includes: (1) any written or oral statement or writing made before a . . . judicial proceeding . . . ; [or] (2) any written or oral statement or writing made in connection with an issue under consideration or review by a . . . judicial body” “A cause of action “arising from” defendant’s litigation activity may appropriately be the subject of a section 425.16 motion to strike.’ [Citations.]” (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056.)

2. No Protected Activity

The court found the contents of the two letters were protected activity under section 425.16, stating “a demand letter is protected activity.” We conclude this was an overly broad interpretation of *Blanchard v. DIRECTV, Inc.* (2004) 123 Cal.App.4th 903, on which it relied, and is not supported by the facts.

Under the statute, “statements, writings and pleadings in connection with civil litigation are covered by the anti-SLAPP statute.” (*Bailey v. Brewer* (2011) 197 Cal.App.4th 781, 789.) “[A]lthough litigation may not have commenced, if a statement ‘concern[s] the subject of the dispute’ and is made ‘in anticipation of litigation ‘contemplated in good faith and under serious consideration’” [citation] then the statement may be petitioning activity protected by section 425.16.’ [Citations.]” (*Id.* at pp. 789-790.)

Blanchard is consistent with *Bailey*. Although that court did state the section 47(b) litigation privilege² “has been broadly applied to demand letters and other prelitigation communications by attorneys [citations]” (*Blanchard v. DIRECTV, Inc.*, *supra*, 123 Cal.App.4th at p. 919), it went on to explain that the letters had to be sent “in connection with a proposed litigation that is ‘contemplated in good faith and under serious consideration [citation]’” [citations]” (*ibid.*).

Here nothing in the record shows the two letters were sent in serious and good faith contemplation of litigation. The letters themselves do not mention litigation. Instead, the strongest threat in the second letter is that if plaintiff failed to make the required payments, he would be in default with the entire balance then accelerated.

² Generally, communications protected under section 47(b) are also entitled to protection under section 425.16. (*Johnson v. Ralphs Grocery Co.* (2012) 204 Cal.App.4th 1097, 1104.) This dual protection applies to prelitigation demand letters that satisfy the requirements of section 425.16. (*A.F. Brown Electrical Contractor, Inc. v. Rhino Electric Supply, Inc.* (2006) 137 Cal.App.4th 1118, 1128.)

Tenen stated nothing about litigation in either of his declarations in support of the anti-SLAPP motions.

The mere fact a collection letter is sent does not mean it was sent in contemplation of litigation. In *A.F. Brown Electrical Contractor, Inc. v. Rhino Electric Supply, Inc.*, *supra*, 137 Cal.App.4th 1118, the court ruled there was insufficient evidence collection letters were sent in contemplation of litigation and thus were not protected by section 425.16. (*Id.* at p. 1128.) The statement the defendant would “pursue all available legal remedies” was not enough to show an action “was under serious consideration.” (*Ibid.*)

In our case there is no evidence defendants even threatened to pursue legal remedies. Thus, defendants did not meet their burden of proof as to the first prong of the anti-SLAPP analysis and the motion must fail.

Because we decide the appeal on this basis we need not address any of plaintiff’s other arguments.

DISPOSITION

The judgment is reversed. The motion for judicial notice is granted. The motion to dismiss the appeal is denied. Plaintiff is entitled to costs on appeal.

THOMPSON, J.

WE CONCUR:

MOORE, ACTING P. J.

IKOLA, J.